No. 784

FILED
APR 28 1950
CHARLES ELMORE CROPLEY
CLERK

In the

Supreme Court of the United States

October Term, 1949

C. A. MAHON, *Petitioner,*

vs.

GEORGE BENNETT, Doing Business as GEORGE BENNETT CONSTRUCTION COMPANY, and HARRY BENNETT, *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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INDEX.

PAGE

Opinions below 1

Federal jurisdiction 2

Jurisdiction of Supreme Court 2

Summary of the matter involved 2

Questions presented 4

Specifications of error 5

Reasons for granting the writ 6

I.

In reversing the verdict of the jury and the findings of the trial judge, the Court of Appeals (1) transcended its powers under Rule 52 (a); (2) its decision is in conflict with controlling decisions of this Court and decisions of other federal circuits construing Rule 52 (a); and (3) is in conflict with Missouri contract law on joint adventure and the modern doctrine of coercion 6

Conflict with controlling Supreme Court decisions and decisions of other circuits 8

Analysis of the evidence and the findings of the trial and appellate courts 11

Evidence on the issue of joint adventure 11

Bennett on joint adventure 14

The verdict, findings and opinion in the trial court 15

Opinion of the Court of Appeals on joint adventure 17

Evidence on the issue of coercion 22

Bennett on coercion 24

The jury and Judge Reeves on coercion 25

Opinion of the Court of Appeals on coercion 26

The decision of the appellate court is in conflict with the established Missouri contract law on coercion 28

II.

The issues of joint adventure and duress were basically legal. The verdict of the jury, undeniably supported by substantial evidence, was conclusive. And the Court of Appeals erred in holding that its review was governed by Rule 52 (a). And reversing the fact findings below deprived petitioner of his constitutional right under the Seventh Amendment to a trial by jury of these issues 32

III.

The Court of Appeals exceeded its judicial powers in pre-judging plaintiff's case under the written contract; and in so doing abridged his right to due process and to a trial by jury accorded to him by the Fifth and Seventh Amendments to the Federal Constitution 35

Urgent need for certiorari 38

Table of Cases.

Adamson v. Gilliland, 242 U. S. 350 9
Aetna Casualty & Surety Co. v. Quarles, 4 Cir., 92 F. 2d 321 35
(American) Lumbermen's Mut. Casualty Co. v. Timms and Howard, 2 Cir., 108 F. 2d 497 34

Bell v. Campbell, 123 Mo. 1, 25 S. W. 359 31
Bozarjian v. Woods, 1 Cir., 175 F. 2d 483 10
Bray v. Haskins, 229 S. W. 1074 (Mo. Sup.) 31, 32
Brown v. Worthington, 162 Mo. App. 508, 142 S. W. 1082 28

Denny v. Guyton, 327 Mo. 1030, 40 S. W. 2d 562 .....19, 28, 34

Eureka Bank v. Bay, 90 Kan. 506, 135 Pac. 584 31

Feinberg v. Millner, 178 S. W. 2d 108 (Mo. App.) 28
Fountain v. Filson, 336 U. S. 681, 93 L. Ed. 768 37
Furman v. Gulf Insurance Co., 8 Cir., 152 F. 2d 891 .....30, 34

Gates v. Woods, 4 Cir., 169 F. 2d 440 10
Guardian Trust Co. v. Meyer, 8 Cir., 19 F. 2d 186 31

Hargrove v. American Central Insurance Co., 10 Cir., 125 F. 2d 225..34

In re Gotfried, S. D. Calif., 45 F. Supp. 939 28

James v. U. S., 5 Cir., 175 F. 2d 769 10

Leroux & Co. v. Merchants Distilling Corporation, 7 Cir., 165 F. 2d 481 10

Mississippi Valley Trust Co. v. Begley, 298 Mo. 684, 252 S. W. 76 28

Nelson v. Abraham, 29 Calif. 2d 745, 177 P. 2d 931 28
Neville v. D'Oench, 327 Mo. 34, 34 S. W. 2d 491 19

Pacific Indemnity Co. v. McDonald, 9 Cir., 107 F. 2d 446 35
Philco Corporation v. F. & B. Mfg. Co., 7 Cir., 170 F. 2d 958 10

Ring v. Spina, 2 Cir., 166 F. 2d 546 35

Skelly Oil Co. v. Holloway, 8 Cir., 171 F. 2d 670 16
Smith v. McLane, 3 Cir., 174 F. 2d 819 10
Spencer v. Wilsey, 330 Ill. App. 439, 71 N. E. 2d 804 28

United Brotherhood, etc., v. Sperry, 10 Cir., 170 F. 2d 863 10
U. S. v. Aluminum Co. of America, 2 Cir., 148 F. 2d 416 10
U. S. v. Knight, 336 U. S. 505 35
U. S. v. Railway Co., 10 Cir., 171 F. 2d 377 10
U. S. F. & G. Co. v. Koch, 3 Cir., 102 F. 2d 288 35
U. S. v. Yellow Cab Co., 338 U. S. 338 .....8, 9, 30

Van Sant v. American Express Co., 3 Cir., 169 F. 2d 355 32

PAGE

Walling v. General Industries Co., 330 U. S. 545 9
Westcott v. U. S. F. & G. Co., 4 Cir., 158 F. 2d 20 10
White v. McCoy Land Co., 229 Mo. App. 1019, 87 S. W. 2d 672 28
White v. Scarritt, 341 Mo. 1004, 111 S. W. 2d 18 28
L. B. Wilson, Inc., v. Federal Communications Com'n., App., D. C., 170 F. 2d 793, 802 37
Woods v. Fliss, 7 Cir., 168 F. 2d 612 10

Statutes and Rules Cited.

Federal Rules of Civil Procedure:
Rule 8(c) 32
Rule 12 (h) 32
Rule 38 33
Rule 38(a) 5, 34
Rule 38(b) 5, 33
Rule 39 33
Rule 52 8
Rule 52(a) 4, 5, 6, 8, 16, 21, 32, 38
Rule 57 .....5, 33

U. S. Const., Amend. V 5, 37
U. S. Const., Amend. VII 5, 34, 38
28 U. S. C., §1254 2
28 U. S. C., §2101(c) 2
28 U. S. C., §§2201, 2202 (1948) 33

Text Books.

Borchard, Declaratory Judgments, pp. 674-676 (2d ed., 1941) 35
48 C. J. S., pp. 824-826 28
3 Moore's Federal Practice, pp. 3005-3006 (1938 ed.) 35
5 Williston, Contracts, §1626 (Rev. ed., 1937) 31

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No. ----------

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Petitioner prays certiorari to review a judgment of the Court of Appeals for the Eighth Federal Circuit entered February 14, 1950.

OPINIONS BELOW.

The Federal District Court opinion written by Judge Albert L. Reeves (R. 733) was filed December 27, 1948, and is reported in 81 F. Supp. 901; that of the Court of Appeals by Judge Woodrough (R. 762) February 14, 1950, is reported in 180 F. (2) 225.

FEDERAL JURISDICTION.

Petitioner, a citizen and resident of Missouri, brought this suit in the Circuit Court of Jackson County, Missouri, April 4, 1946, against George Bennett and Harry Bennett, citizens and residents of Kansas. The requisite diversity of citizenship and amount involved existing, the Bennetts, by appropriate action, removed the cause to the Federal District Court, Western District of Missouri (R. 1, 7, 9, 763).

JURISDICTION OF SUPREME COURT.

The judgment below was entered February 14, 1950 (R. 780), reversing the District Court's judgment entered December 24, 1948 (R. 742-744). Petition for Rehearing, filed March 1st, 1950 (R. 781), was denied March 8, 1950 (R. 811). March 16, 1950, mandate was stayed pending the filing of this petition (R. 812). Jurisdiction of this court is invoked under Title 28, U. S. C., Sections 1254 and 2101 (c) of the new Judicial Code, effective September 1, 1948.

SUMMARY OF THE MATTER INVOLVED.

Petitioner, C. A. Mahon, plaintiff, invoking the Federal Declaratory Judgment Act, alleged in his complaint that he and defendant (respondent here) George Bennett had entered into an oral contract of joint adventure whereby if Bennett got the award they as partners would perform the contract with Kansas City, Missouri, for collecting and disposing of its garbage; that Bennett was awarded a ten-year contract; but that a few days before the award, he repudiated the joint adventure agreement and, a few hours before the letting, wrongfully coerced

Mahon into signing a written contract of employment with Bennett and to abandon the joint adventure agreement.

The court was asked to find these facts and declare the rights of the parties, including plaintiff's rights as against the defendant Harry Bennett, to whom George afterwards sublet the collection part of the garbage contract. There was also a prayer for an injunction and for an accounting. In the alternative, Mahon, alleging wrongful discharge by George Bennett under the written contract, sought damages against him in the sum of $500,000 (R. 1-8).

The cause has been in court since April, 1946 (R. 8), and has been twice tried. Plaintiff seasonably demanded trial by jury on all issues so triable, and requested the court to try the other issues with the aid of an advisory jury (R. 14-15). The motion was sustained (R. 25-26). On the first trial, the jury, answering two special questions, found no joint adventure and no coercion, but awarded plaintiff $5,000 as damages against George Bennett for wrongful discharge under the written contract (R. 87). The trial court sustained plaintiff's motion for a new trial "on all the issues of the case" (R. 87-89).

At the second trial (R. 682), the jury, answering the special questions, found the issues of joint adventure and coercion in plaintiff's favor (R. 687), and the jury was discharged (R. 688). Defendants moved for an order rejecting the verdict (R. 689-697). Following brief and argument, Judge Reeves handed down a memorandum opinion, in which, after reviewing and expressing his views on the testimony, he accepted the verdict, adopted the findings as his own and gave plaintiff's requested findings of fact and conclusions of law (R. 733-738). He then entered judgment in favor of plaintiff on the issues

of joint adventure and coercion and defined the rights and obligations of the parties (R. 738-744).

On appeal, the Eighth Circuit reversed, holding that this part of the suit was in equity (R. 763, 767), and that the verdict and findings below on the issues of joint adventure and coercion were "clearly erroneous" (R. 779). The cause was remanded to the District Court with directions to dismiss the action as to Harry Bennett, and as to George Bennett except the action for damages (R. 779, 780).

QUESTIONS PRESENTED.

A.

Has a Federal Court of Appeals exceeded its judicial powers under Rule 52 (a) of the Federal Rules of Civil Procedude when, on appeal, it tries the case *de novo*, reverses as "clearly erroneous" the special verdict of an advisory jury and the fact findings and judgment of the trial judge, where the verdict and findings are based on substantial testimony, the evidence was oral, was in sharp conflict and given in open court, and such findings had to include passing on the credibility of the witnesses, weighing the testimony, and choosing between two opposite versions of the truth?

B.

Where plaintiff, invoking the Federal Declaratory Judgment law, asks findings and declarations whether he and defendant by contract became joint adventurers, whether plaintiff was wrongfully coerced by defendant into abandoning that agreement and signing a contract of employment with defendant; and there is a prayer for an injunction and an accounting, are the issues of joint adventure and coercion basically legal entitling

plaintiff [who has seasonably applied therefor under Rule 38 (b)] to a trial by jury of those issues? And where the verdict for plaintiff is supported by substantial testimony but the Court of Appeals rejects and reverses it as "clearly erroneous" under Rule 52 (a), has plaintiff been deprived of his right of trial by jury guaranteed by the Seventh Amendment and as preserved by Rule 38 (a), and Rule 57?

C.

Where in such case the appellate court remands the cause for trial of the undecided issue of plaintiff's alleged wrongful discharge under the written contract, but in its opinion holds that plaintiff was incompetent to perform his duties under that contract and strongly implies that he was rightfully discharged, has plaintiff's cause been pre-judged, and has he been deprived of his Constitutional right under the Seventh Amendment to a trial by a jury; and has he been deprived of his property rights without the due process of law accorded to him by the Fifth Amendment to the Federal Constitution?[1]

SPECIFICATIONS OF ERROR.

The Court of Appeals erred:

(1) In holding that the verdict of the jury and the findings of the trial court were "clearly erroneous" on the issues of joint adventure and coercion.

(2) In holding that the proceeding on these issues was equitable and on appeal governed by Rule 52 (a).

(3) In pre-judging the merits of plaintiff's cause on the issue of wrongful discharge under the written contract.

---

[1] These questions were duly raised in appellee's Petition for Rehearing (R. 781-809).

REASONS FOR GRANTING THE WRIT.

I.

IN REVERSING THE VERDICT OF THE JURY AND THE FINDINGS OF THE TRIAL JUDGE, THE COURT OF APPEALS (1) TRANSCENDED ITS POWERS UNDER RULE 52 (a); (2) ITS DECISION IS IN CONFLICT WITH CONTROLLING DECISIONS OF THIS COURT AND DECISIONS OF OTHER FEDERAL CIRCUITS CONSTRUING RULE 52 (a); AND (3) IS IN CONFLICT WITH MISSOURI CONTRACT LAW ON JOINT ADVENTURE AND THE MODERN DOCTRINE OF COERCION.

Granting, but not conceding, that this part of the suit is in equity governed on appeal by Rule 52 (a), nevertheless if the decision of the learned Court of Appeals is allowed to stand, then a federal appellate court has the unrestricted power, even though the testimony sharply conflicts, to reverse the verdict and findings of a jury and a trial court, notwithstanding such findings had to include weighing the evidence, passing on the credibility of the witnesses, and choosing between two opposite versions of the truth. And in the end, for all practical purposes, Rule 52 (a) means nothing.

Judge Reeves presided over two long trials. Mahon's affirmance and Bennett's denial of a joint adventure contract between them and of Bennett's wrongful coercion rested on the oral testimony of these two men. Their versions of what occurred were in diametric conflict.[2] On each trial Judge Reeves manifested his belief in Mahon's and his disbelief in Bennett's version of the facts. The Judge rejected the first jury's verdict (R. 114) and accepted that of the second (R. 739). He saw, observed and heard these men on the witness stand.

[2] Notwithstanding the two-volume record the testimony on these two issues is not lengthy. We cannot adequately present the claims of this petition, nor can the court get the full impact of what the Court of Appeals has done without going to some extent into the record. But the task will not be great.

The findings of the jury and of the trial court had to include appraising the weight and value of the testimony of these men and passing on their credibility as witnesses. Four times, in four different ways, the triers of the facts in the District Court found in favor of plaintiff on the sharply controverted issues: (1) the verdict of the jury (R. 607); (2) acceptance and approval of the verdict as correct and adoption of it by the court as his own finding (No. 1, R. 739-740); (3) the written opinion of Judge Reeves, in which he found independently that plaintiff's evidence supported the complaint, that the oral agreement was made, that plaintiff's testimony was positive and that he gave complete details of the agreement, that he was corroborated in his contentions by letters from him to Bennett, and by the testimony of Bennett himself; that at a time when Mahon was entirely in Bennett's power and unable to enlist other capital, Bennett told him he could either accept a job or get nothing and being thus coerced and unfamiliar with his rights, he signed the written contract under this illegal compulsion (R. 733-738); and (4) the giving of seven special fact findings (R. 739-741).

As will be shown, the fact recitals in the opinion of the learned Court of Appeals reject as untrue the plaintiff's evidence, as "clearly erroneous" the fact findings of the jury and the trial judge, based on plaintiff's testimony, and accept and adopt as true and correct the oral testimony of the defendant George Bennett. The learned Court of Appeals tries the case *de novo* and substitutes its own judgment on the credibility of the witnesses and the weight of the evidence for that of the fact finders below.

These recitals also entirely omit significant controlling facts in the record which make the recitals themselves erroneous and without support. *Indeed some of the con-*

trolling recitals are affirmatively contradicted by the record, and others negatively by not being in the record.

CONFLICT WITH CONTROLLING SUPREME COURT DECISIONS AND DECISIONS OF OTHER CIRCUITS

Even in an equity action, a federal appellate court will not try the case *de novo* on disputed facts, will not itself weigh the evidence or reject the trial court's views on the credibility of the witnesses.

In *United States* v. *Yellow Cab Co.*, 338 U. S. 338, 340-342, this Court, in an *equity case*, applying Rule 52(a) to *all* civil cases, legal or equitable, declined to upset fact findings of the trial judge made on conflicting testimony, saying:

> "What the Government asks, in effect, is that we try the case *de novo* on the record, reject nearly all of the findings of the trial court, and substitute contrary findings of our own * * *.
>
> * * * * * * *
>
> "* * * The judgment below is supported by an opinion, prepared with obvious care, which analyzes the evidence and shows the reasons for the findings. To us it appears to represent the considered judgment of an able trial judge, after patient hearing, that the Government's evidence fell short of its allegations—a not uncommon form of litigation casualty, from which the Government is no more immune than others.
>
> * * * * * * *
>
> "Rule 52, Federal Rules of Civil Procedure, provides, among other things:
>
> " 'Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.'
>
> "Findings as to the design, motive and intent with

which men act depend peculiarly upon the credit given to witnesses by those who see and hear them. If defendants' witnesses spoke the truth, the findings are admittedly justified. The trial court listened to and observed the officers who had made the records from which the Government would draw an inference of guilt and concluded that they bear a different meaning from that for which the Government contends.

"It ought to be unnecessary to say that Rule 52 applies to appeals by the Government as well as to those by other litigants. * * * While, of course, it would be our duty to correct clear error, even in findings of fact, the Government has failed to establish any greater grievance here than it might have in any case where the evidence would support a conclusion either way but where the trial court has decided it to weigh more heavily for the defendants. *Such a choice between two permissible views of the weight of evidence is not 'clearly erroneous.'* " (Our emphasis.)

In the case at bar, an able and experienced trial judge supplemented the verdict and judgment below by a written opinion prepared with care which analyzed the evidence and showed the reasons for the findings (R. 733-738). Those findings, depending (as presently shown) peculiarly upon the credence given to witnesses by those who saw and heard them and inevitably involving determination whether Mahon's mind and will were overcome when he signed the written contract were the function and the prerogative of the fact finders in the trial court. And the choice of the jury and of the trial judge "between two permissible views of the weight of the evidence * * * were not * * * clearly erroneous" under the ruling of this court in the recent *Yellow Cab Co.* case. See, also, *Walling* v. *General Industries Co.*, 330 U. S. 545, 551; *Adamson* v. *Gilliland*, 242 U. S. 350, 353.

So also, the opinion below is in conflict with a line of decisions in the 1st, 2nd, 3rd, 4th, 5th, 7th and 10th Circuits which hold that findings of a trial judge are final, unassailable and binding on a federal appellate court where (as here) the evidence is in sharp conflict and the findings had to include weighing the testimony, passing on the credibility of witnesses who appeared before him and deciding on the truth or falsity of two opposite versions of the facts. *United States* v. *Aluminum Co. of America,* 2 Cir., L. Hand, J., 148 F. (2d) 416, 433; *Westcott* v. *U. S. F. & G. Co.,* 4 Cir., 158 F. (2d) 20, 23; *Leroux & Co.* v. *Merchants Distilling Corporation,* 7 Cir., 165 F. (2d) 481, 482; *Gates* v. *Woods,* 4 Cir., 169 F. (2d) 440, 443; *Philco Corporation* v. *F. & B. Mfg. Co.,* 7 Cir., 170 F. (2d) 958, 960; *United Brotherhood, etc.,* v. *Sperry,* 10 Cir., 170 F. (2d) 863, 867; *U. S.* v. *Railway Co.,* 10 Cir., 171 F. (2d) 377, 379-380; *Smith* v. *McLane,* 3 Cir., 174 F. (2d) 819, 821; *James* v. *U. S.,* 5 Cir., 175 F. (2d) 769; *Bozarjian* v. *Woods,* 1 Cir., 175 F. (2d) 483; *Woods* v. *Fliss,* 7 Cir., 168 F. (2d) 612, 614.

A fair example of the rulings in other circuits as above cited is in the following excerpt from the opinion of Judge Learned Hand in *United States* v. *Aluminum Co. of America, supra* (148 F. (2d), l. c. 433):

> "* * * It is idle to try to define the meaning of the phrase 'clearly erroneous'; * * *
>
> "* * * However, whatever may be said in favor of reversing a trial judge's findings when he has not seen the witnesses, when he has, and in so far as his findings depend upon whether they spoke the truth, the accepted rule is that they 'must be treated as unassailable.' *Davis* v. *Schwartz,* 155 U. S. 631, 636, 15 S. Ct. 237, 39 L. Ed. 289; *Adamson* v. *Gilliland,* 242 U. S. 350, 353, 37 S. Ct. 169, 61 L. Ed. 356; *Alabama Power Co.* v. *Ickes,* 302 U. S. 464, 477, 58 S. Ct. 300, 82 L. Ed. 374. * * *"

In the next few pages we demonstrate by short analyses of the evidence and the findings of the trial and appellate courts that the latter, exceeding its powers, went beyond the utmost verge in reversing the verdict and the trial court findings and judgment.

ANALYSIS OF THE EVIDENCE AND THE FINDINGS OF THE TRIAL AND APPELLATE COURTS.

Evidence on the Issue of Joint Adventure.[3]

In brief, plaintiff's evidence, oral and written, ran thus: A college man, he was 54 years of age at trial time. He served as chief garbage inspector for Kansas City, Missouri, from November, 1940, to November, 1941, and as building manager of the City Hall from 1941 until 1945 (R. 147-148). He had accumulated a modest fortune of approximately $50,000 (R. 323-324).

The Sanitary Service garbage contract with the city was to expire July 15, 1945 (R. 149). Shortly after entering the city's employ as chief garbage inspector, Mahon became interested in the business and determined that some day he would be in the garbage business for himself. During the next four years he applied himself faithfully to learning all he could about garbage collection and disposal. He studied every detail. He investigated the business in other cities. He studied costs, immunization and hog mortality. He was preparing himself to be useful to someone with capital to go in with him in the event a successful bid could be made on the expiration of the existing garbage contract (R. 150-154). In October, 1944, Mahon mentioned his ambition and plan to his friend and lawyer, Mr. Clyde Linde, who was also Bennett's lawyer (R. 155). A few days later Linde and Mahon met with George Ben-

[3] While the Court of Appeals did not expressly reverse the verdict and findings in the trial court on this issue, the recitals in the opinion were the equivalent of a reversal.

nett at the latter's office in Kansas City, Kansas (R. 156). They spent the afternoon there (R. 157). Mahon outlined the garbage collection and disposal business and asked Bennett whether he would be interested in going into it if the opportunity offered. Bennett was interested and so expressed himself (R. 158-159). At the meeting Mahon outlined a proposed agreement between them to this effect: He would operate the business for one-half of the profits with no salary of any sort. He estimated it would take an initial capital contribution of about $160,000, $10,000 of which Mahon was willing to put up if Bennett would provide the balance. The money put up as capital would be retired in proportion to their contributions (R. 158-159). Bennett asked Mahon to keep in close touch with him (R. 160). Within a week they had come to an accord orally on the terms above outlined. Bennett insisted that only he and Mahon should be in the enterprise, exacting the latter's promise [which was kept] not to seek other capital (R. 160-161). Sometime before December 11, 1944, Bennett asked Mahon to address a letter to him [Bennett] outlining what they had agreed on and what they might count on in the way of costs, operating conditions, profits, etc. (R. 162). Mahon wrote that letter on December 11, 1944. Following its receipt, they discussed it together (R. 163). In the letter [Plffs. Exh. 1, R. 172, 173-177] Mahon not only outlined several plans for making a bid, *but recited the substance of their agreement with each other.* In part he said (R. 177):

> "Dear Mr. Bennett:
>
> * * * * * * *
>
> I have been working on some figures in an effort to arrive at a basis for making our bid on the garbage contract; * * *. As I think we should try to at least safely break even on our hauling cost, I am estimating our profit possibilities on our hog feeding as

follows: * * *. Since our profit possibilities can vary so greatly, and on five cent hogs we will just about get our invested capital back whole, it would seem advisable to step up the amortization figure of $16,000 on good years such as is pictured with twelve cent hogs to possibly 50 per cent, which would return you $75,000, and me $5,000 on our invested capital. We could then split the remainder of the net profits, which would then amount to $101,000, and would allow each of us $50,500, in such good years * * *."

Shortly after the letter was sent, he and Bennett read it through together in Bennett's office and when those portions outlining the terms of their agreement were read, Bennett made no objection, indicating that "that was all right with him" (R. 168).

Bennett himself testified that he asked Mahon to write the letter, admitted receiving it (R. 439) and discussing its contents with Mahon in Bennett's office (R. 470-471).[4] Mahon signed the letter. Bennett did not, but on the first page in Bennett's handwriting are these words: "These figures submitted by C. A. Mahon for bidding purposes" (R. 173).

January 17, 1945, Mahon addressed another letter to Bennett (Plffs. Exh. 2, R. 184-187), outlining several alternative bid proposals and estimating results and profits. Throughout this letter he uses the pronouns "we," "our" and "us," and the letter concluded (Plffs. Exh. 2, R. 187):

"We could then cover collections and disposal and depreciation and return of original invested capital on a basis of planning to us about $350,000.00 per year, and feel assured that the balance would be profit for the full ten year period. This would give

[4] Bennett further testified that in reading over the letter together they discussed all parts except those outlining the contract between them (R. 470-471).

> us $140,000.00 per year to split or an almost assured income of $70,000.00 per year plus return of all of our invested capital."

Bennett denied receiving this letter (R. 472-473), but Judge Reeves in his opinion found that he did (R. 734-735).

For five months between October, 1944, and March, 1945, Mahon was in contact personally or by telephone almost daily with Bennett, his engineers and his organization, discussing and working on plans for bidding the contract if the opportunity offered (R. 170-171). During this period Mahon, faithful to his promise, refrained from seeking other capital (R. 180).

Bennett on Joint Adventure

Bennett testified that Mr. Linde, pursuant to arrangement, brought Mahon to Bennett's office November 4, 1944 (R. 427-428); that they all visited together for about an hour. Mahon said the present contract was about to expire. He gave Bennett some information about it; "that was practically all that occurred * * *" (R. 428). Mahon was at Bennett's office on several occasions after that, once or twice a week, Mahon was getting more information and would keep Bennett posted (R. 429). When he saw Mahon again early in December the latter said he had a lot of figures that would be interesting. Bennett then suggested that Mahon get them in writing, "So on the 10th or 11th he sent me a letter with some figures on it" (R. 429).

That before Bennett got this letter Mahon outlined a proposition whereby he would put in some money and "I would put in some. We would form a partnership. He said he could raise about $10,000 if I could raise $150,000 or $160,000, and I wasn't interested in that at all * * *. I told him I wouldn't be interested in his figures like that or any kind of a proposition like that; that I had had a

partner for 18 years and didn't want any more" (R. 429-430).

> "Q. In other words, from and after the first time he made this proposition to you, you turned it down, didn't you? A. That's right.
>
> Q. And he thoroughly understood from what you said to him that you wouldn't go in with him on any such basis or with anybody else, didn't he? A. I take it that he did.
>
> Q. And you made it clear enough to him, didn't you? A. I tried to" (R. 470).

Bennett then gave these conflicting versions of his contract talks with Mahon: Before I got the letter Mahon proposed the partnership (R. 429). The only time I ever discussed this matter with him was after I got the letter of December 11th (R. 470). The only time he ever made this suggestion to me was in the letter and afterwards, and then a few days before March 12, 1945. Never before March 12, 1945, the day we signed the written contract, did Mahon ever claim to me orally that we were in this enterprise together. He made no such claim to me on March 3rd when I offered him employment. Mahon never claimed to me on any other occasion, either before or after he wrote the letter of December 11th, that he and I were in this proposition together (R. 473-476).

The Verdict, Findings and Opinion of the Trial Court.

The advisory jury found that in the fall or winter of 1944 Mahon and George Bennett entered into an oral contract by which it was agreed that if Bennett was awarded the garbage contract they would go in together in performing the contract, Bennett to do the principal financing and Mahon to contribute $10,000 toward the enterprise, that the profits from the operation would be split equally

between them, that Mahon would manage the business without other compensation to him (R. 687).

In his written opinion (not mentioned in Judge Woodrough's opinion) Judge Reeves made independent fact findings in his own language, which in themselves were findings recognized as proper in the amendment to Rule 52(a). See *Skelly Oil Co.* v. *Holloway,* 8 Cir., 171 F. (2d) 670, 672-673. In part, Judge Reeves said (R. 734-735):

> "Plaintiff had gone in quest of capital to finance such a contract and through an intermediary met the defendant, George Bennett. Immediately Mr. Bennett evinced an interest. Further negotiations ripened into an agreement to the effect that George Bennett would advance $150,000, the plaintiff would advance $10,000, and this aggregate of $160,000 was deemed adequate for a working capital. The plaintiff, on his part, agreed to manage and operate the entire business under the contract including the feeding of the hogs, and for his contribution to capital and for his services the profits would be divided equally, with amounts to be set aside from time to time to amortize or discharge the capital contribution.
>
> "Plaintiff's evidence supported the complaint; an oral contract of joint adventure or partnership was consummated on or about the 12th of November, 1944. Immediately thereafter the parties began working out the details for a bid to be submitted by or through George Bennett, when invited to do so by the City. The plaintiff began planning the details of operations under the contract, if same should be awarded on the bid thus to be submitted.
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> • • • • • • •
>
> "Although strenuously denied by defendant, George Bennett that such a contract was ever agreed upon between him and the plaintiff, yet the plaintiff's testimony was positive with respect to the oral agreement and he gave complete details of the claimed joint adventure arrangement consummated between him

and the defendant George Bennett, on or about November 12, 1944. The plaintiff was corroborated in his contention by letters written by him to the said defendant between the making of the agreement and its alleged repudiation by the said defendant on March 3, 1945.

"Plaintiff said that, relying upon the agreement, he had discontinued his efforts to assemble capital or to arrange to bid for the garbage contract."

Passing on the credibility of the testimony of the two men, Judge Reeves continued (R. 735):

"* * * Again, he [Mahon] is supported in his contention by the defendant's testimony as to the conversation had between them on March 3, 1945.

"It may be properly inferred from the testimony of the defendant that there had been an agreement between the parties and that the defendant then emphasized that he would not carry out a partnership agreement with plaintiff but that he would give the plaintiff employment at a substantial wage or salary, and that in addition he would permit him to participate to a limited extent in the profits of the enterprise. His counterproposal at the time would indicate that he was endeavoring to get rid of a prior agreement."

Opinion of the Court of Appeals on Joint Adventure.

Treating the issues, joint adventure and coercion as equitable and review "governed by the Rules applicable to appeals in equity" and "recognizing that we should sustain the finding(s) unless * * * clearly erroneous," the opinion proceeds to these astonishing findings and conclusions:

Mahon testified "that he wanted to get a position to manage the operations under such a (garbage) contract" (R. 769).

Nowhere in the record did Mahon testify that he wanted to get "a position". His testimony was that he was looking for a partner.

> "It is clear from the evidence that Bennett could not and did not make up his mind what he was going to do about bidding on or contracting with the City until he got the completed specifications, which was in February of 1945 (R. 770). As soon as he had the completed specifications, Bennett told Mahon what he would agree to do in the matter of assisting him in the enterprise" (R. 771).

These statements were from Bennett's direct examination (R. 430, 433).

> Mahon testified that the oral agreement after made was "mutually abandoned" and that afterwards a new or modified oral agreement was entered into "by the terms of which Bennett agreed to invest all the money 'necessary' ". That Mahon did not specify what caused the "abandonment" (R. 771).

Mahon's testimony was that sometime in January it became apparent that $160,000 would probably not finance the enterprise. He offered to put up $20,000 or go out and raise additional capital elsewhere. Bennett said he would see his banker. A few days later, he advised Mahon that their financial situation was solved, that he had contacted the banker, who had agreed to loan them all the money they needed at 3 per cent (R. 179-180). Mahon wanted to be sure that the new situation would in no way affect their original agreement and he asked Bennett whether it would. Bennett assured him it would not, saying, "We will have to pay the money back and have to pay 3 per cent interest on it but the original agreement stands just as it was made" (R. 180). Mahon had

more than $20,000 in liquid securities at that time which he could put up (R. 180).

> "While Mahon testified freely about the contract, his difficulty was to define what he claimed it was agreed either of the partners was to do" (R. 772).

Mahon's testimony, his letters and the fact findings below were not vague. He was to contribute $10,000 initially, was to devote all of his time to the enterprise, Bennett was to contribute initially the rest of the capital, their contributions were to be returned to them proportionately, they were to divide the profits equally and Mahon was to receive no other compensation for having brought the opportunity to Bennett and for his services throughout the garbage contract.

If this statement of the learned Court of Appeals rules or implies that the agreement was too indefinite, it is in direct conflict with the Missouri law.

In *Denny* v. *Guyton,* 327 Mo. 1030, 1056, 40 S. W. (2d) 562, 572, the Missouri Supreme Court in its most important ruling on the subject, said of contracts of joint adventure:

> "* * * But it may be said of the great majority of such agreements that they do not point out precisely what each party is to do under them. [Citing cases.] And the contract is not avoided for indefiniteness because the minor details are not fully established. [Citing cases.] * * * Such an agreement may be implied."

In *Neville* v. *D'Oench,* 327 Mo. 34, 59-60, 34 S. W. (2d) 491, the Missouri Supreme Court said:

> "It is the settled law that a contract of joint adventure, or of partnership, need not be established by

showing an express agreement of the parties, that such a contract may be implied and inferred, in whole, or in part, from the acts and conduct of the parties. * * *"

Judge Woodrough's opinion proceeds (R. 773):

"But it is clear from Mahon's testimony that he carried on all the negotiations he had with Bennett about the garbage collection and disposal in the expectation of arriving at an agreement in writing. He so testified and he fully understood that in view of the large amounts involved, the length of time the work was to go on, its many complications, and the extraordinary kind of agreement he was seeking, a writing would be required in order to define the undertakings of the parties. He never even attempted to formulate such a writing, much less to submit one to Bennett before the third day of March, 1945, when the final specifications of the city for the first time disclosed what the work was on which the city called for bids. Mahon's claim that Bennett orally agreed upon any contract between them prior to that time rests solely on his testimony and it is not corroborated or supported by any other witness or any unequivocal fact or circumstance found in the record."

Nowhere in the record did Mahon testify that he negotiated with Bennett "in the expectation of arriving at an agreement in writing"; or that he fully understood that a "writing" would be required in order to define the undertakings of the parties. The statement that Mahon never attempted to formulate "such a writing" prior to March 3, 1945, is in conflict with the record and the testimony of both Mahon and Bennett, as has already been shown. And the recital that the contract of joint adventure rested solely on Mahon's uncorroborated testimony

and was not supported by any other witness or any fact or circumstance is incorrect. But even if correct, it presents no ground for the reversing action of the Court of Appeals. If Mahon's testimony was uncorroborated, so was Bennett's. Moreover, Judge Reeves found that Mahon's testimony was corroborated by his letters and by the testimony of Bennett himself (R. 734-735).

The appellate opinion then proceeds (R. 778):

> "* * * He [Mahon] knew that his claimed oral contract was strange and improbable, and that it rested solely on his uncorroborated word against Bennett's."

In this part of the opinion, the learned judge again entered the jury box, substituting his judgment for that of the jury and the trial court on the weight and value of the evidence and the credibility of the witnesses. And in so doing he wrote 52(a) out of the Federal Rules of Procedure.

Much can be said of this last quotation. Contracts are made every day where one man contributes his talents and time against another's capital[5] for an equal division of the profits. Mahon did much more. He brought to Bennett, a contractor living in another state, the opportunity which resulted in his obtaining the garbage contract with Kansas City (Bennett, R. 493). He worked five months with Bennett and his organization giving them the benefit of five years of knowledge acquired from intensive study. At Bennett's request Mahon refrained from seeking other capital.

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[5] Plaintiff's accountant testified that the most money George Bennett had invested at any time was $139,500 (R. 327). At trial time, this investment had been reduced to $42,000 (R. 327).

Other portions of the opinion take the material for its findings from the testimony of Bennett. Thus (R. 773):

> "When on the other hand, we turn to Bennett's testimony we find a clear and credible account of what occurred between him and Mahon."

It is then recited that Bennett could do nothing concrete about an agreement with Mahon until the specifications came out (R. 774), and that Bennett

> "* * * never gave a thought to making any contract about it with Mahon, and did not make any such contract" (R. 774). Not until the specifications had been submitted by the City did he discuss the contract with Mahon or make * * * "his [Bennett's] offer of the terms upon which he would associate Mahon in the enterprise * * *" (R. 774).

These statements also are taken from Bennett's direct examination (R. 430, 431).

Evidence on the Issue of Coercion.

Mahon testified that between November, 1944, and March, 1945, he, trusting Bennett fully, worked with him and his organization in preparing to make the bid. Complying with Bennett's request, he sought no other capital (R. 150-154, 155, 156, 157, 158, 159, 160-161, 162, 163, 180). The day and hour for submitting bids had been fixed by Kansas City at 2:00 P. M., March 12, 1945. Nine days before that, March 3, 1945, Bennett called Mahon to the former's Kansas City, Kansas, office and bluntly told him that he was not going forward with their agreement. There would be no partnership. No equal division of the profits. He would give Mahon a job at $600 a month and 10% of the profits, that was all. Mahon protested. Bennett's reply was that he was going to bid the contract

for himself if Mahon did not accept Bennett's proposition, and Mahon would be out of the garbage business. Mahon was stunned. He didn't know what to do. During the ensuing week, he attempted without success to obtain capital elsewhere. It was too late. Several times during the week he returned to Bennett's office presenting different propositions, offering to reduce his percentage. To all of these overtures Bennett was adamant. Mahon's last appeal was for 15% on Saturday, the 10th (R. 181-182).

Sunday, March 11th, Mahon called at Mr. Linde's office, telling him what Bennett had done (R. 182). Linde advised that the best thing to do would be to accept Bennett's offer, but to get it in writing. Mahon then asked Linde to prepare a contract. Linde demurred, saying he was representing both of them. But Linde sketched out on a piece of paper a form of contract of employment embracing Bennett's terms (R. 183). Linde's pencil sketch is in the record [Plff's Exh. 3, R. 190, 191-193].

From the sketch Mahon typed out a form of contract between Bennett and him tracking Linde's memorandum. The next morning, Monday, March 12th, he went to Bennett's office, arriving between ten and eleven (R. 195-196). This was the last day and 2:00 P. M. on that day was the last hour when bids would be received (R. 196). Mahon renewed his protests, but Bennett declined to vary in any respect his proposition of March 3rd, saying that was all he would do and that if Mahon did not accept that he, Bennett, was planning "to go ahead that afternoon to bid the contract on his own, and that I would be out" (R. 196). Mahon then presented the written contract to Bennett. Bennett read it, saying, "Clarence, that is what I told you I will do and that is what I will do" (R. 197). They then signed the March 12, 1945, contract (R. 197, Plaintiff's Exhibit 4, R. 198-199).

This agreement was signed at 11:00 o'clock on Monday morning, March 12th, about three hours before the bids were to be submitted (R. 197). Mahon testified that he believed Bennett would carry out his threat and that if he, Mahon, did not sign the written contract, all his efforts of these five years would be lost and gone (R. 203).

Bennett put in his bid just before 2:00 o'clock on March 12 (R. 197). He was the only bidder and was awarded the contract (R. 199). The award to Bennett was confirmed by the Council April 3, 1945 (R. 417). Mahon resigned his employment with the city March 31, 1945, and began working for Mr. Bennett April 3, 1945 (R. 201). August 31, 1945 (R. 203), Bennett discharged him (R. 225).

Bennett on Coercion

Mahon came to his office March 3, 1945. He asked Mahon how much he was making. The latter replied $300 a month. Bennett offered to give Mahon a little more than double that, $600 a month and 10% of the net profits. Mahon wasn't satisfied. He expected a little more "and would like to go into partnership on his deal like he stated in his letter. And I said, 'I never did entertain that at all. That was silly in my estimation.' And then he said, 'Well, if that is the best you will do, I will think it over.' * * * That was the first pass I ever made about a contract * * *. The first time I ever approached him about a contract" (R. 433-434).

Mahon said he would be seeing me in a day or two. I saw him the following Saturday or Sunday, the 10th or 11th of March. He wanted 15% and I said no. He left again and didn't come back until the morning of the 12th, when he had this contract that he signed. He and I agreed to it and I signed (R. 435). On this March 3, 1945, I told Mahon what I would do and all I would do (R. 479); and that if Mahon did not agree to my terms he would be

out, that if my proposition was not accepted I was going to bid the thing for myself (R. 479-480).

The Jury and Judge Reeves on Coercion.

Judge Reeves accepted the verdict (R. 687) on coercion, approved it and adopted it as the court's own finding [No. 1 (b), (R. 740)]. He also gave Finding 7 (R. 741), which is as follows:

> "7. In April, 1945, plaintiff entered the employ of defendant George Bennett under the March 12, 1945, contract, and his employment was terminated on or about August 31, 1945, during which period plaintiff still believed that his only rights in the premises were under the written contract and plaintiff was not advised until shortly prior to the filing of this suit of his rights under the joint adventure agreement with defendant George Bennett, notwithstanding the signing of the March 12, 1945, employment contract."

In his memorandum opinion, Judge Reeves wrote on this subject (R. 735):

> "The plaintiff declined to accept at once the counter-proposal for the reason, as he said, that he was disappointed, nonplussed and confused by the loss of so profitable a contractural arrangement. He protested to the defendant and was then told that he could either accept the proposal then made by the defendant or he would get nothing. According to his testimony he had spent much time and effort on the matter and since the bids were to be submitted within a few days thereafter he felt helpless to protect himself against what he conceived to be a great wrong. Not being familiar with his rights, and under what he claimed was business coercion or duress, he finally agreed to accept the proposal and incorporated such proposal in a written contract."

Opinion of the Court of Appeals on Coercion.

Following its recitals of the evidence on this issue the opinion concludes (R. 779):

> "We are accordingly convinced that the finding that Mahon was coerced into contracting for employment and that he did not so contract of his own free will was clearly erroneous and must be set aside. The finding is not sustained by substantial evidence. * * *"

This conclusion rests on recitals which vary widely from the testimony of both Mahon and Bennett and from the record. Some important examples are:

> "As soon as he had the completed specifications Bennett told Mahon what he would agree to do in the matter of associating him in the enterprise (R. 771). * * * In making the offer [March 3] he set no time limit for its acceptance or rejection (R. 771). * * *
>
> "* * * but our careful search of the records has not disclosed any act or conduct on the part of Bennett from which any coercion, duress or oppression of Mahon can fairly be inferred. * * * (R. 774). Mahon was assured that if he wanted to stand on his alleged oral agreement the subject matter of it was going to be preserved as far as Bennett could do so; Bennett put no time limit on his offer to employ Mahon and Mahon was free to take or leave it as he chose. * * * (R. 774-775).
>
> "* * * It is clear that there was nothing in the situation which existed at the time Bennett made his offer which rendered the timing of it oppressive or unfair * * *" (R. 775).

The recital that Bennett first told Mahon on March 3rd "what he would agree to do" is an all-out accept-

ance of Bennett's testimony. And it rejects plaintiff's proof that they had become joint adventurers back in November, 1944, and that plaintiff, relying on Bennett's agreement, worked with him and his organization for five solid months, at the same time refraining from seeking other capital, and that at the March 3rd meeting Bennett repudiated that agreement, and left Mahon helpless nine days before the letting.

The statement that Mahon was assured that if he wanted to stand on his oral agreement it was going to be preserved for him as far as Bennett could do so, is not only nowhere in the record, but contrary to the testimony of both of these men. It has already been shown that both Bennett and Mahon agree that Bennett's offer on March 3rd and on the morning of March 12th was that Mahon could accept the contract of employment or get nothing.

As to the statements that on March 3rd Bennett set no time limit for Mahon's acceptance or rejection, that Mahon was free to take it or leave it, and that there was nothing at the time which made Bennett's offer or the timing of it oppressive or unfair, the opinion not only disregards all of plaintiff's testimony, but assumes that the coercion is alleged to have occurred on March 3rd and during the period between then and March 12th. The charge in plaintiff's pleading, the verdict of the jury and the findings of the court below were that Mahon's will was overcome by Bennett's threats on the morning of March 12, 1945, when Mahon signed the written agreement three hours before the letting under the compulsion of Bennett's threat that if he did not do so Mahon would be out of the garbage business. A more extreme example of treachery in business by the use of wrongful compulsion could scarcely be shown. Bennett by the law was bound to the observance of the highest degree of good

faith in his dealings with Mahon.[6] He was at Bennett's mercy, entirely in his power. Mahon could not bid. He did not have the money to bid. He had no other capital. He had no other alternative.

The opinion proceeds:

> "Mahon was at Bennett's office when he received the offer to employ him and took it under consideration. He reflected upon it and took advice of his lawyer. It is true, as Mahon knew at the time, that the lawyer had done some work for Bennett as well as for himself, but there is no claim that the lawyer's advice was not honest and disinterested" (R. 775).

The obvious effect on Mahon's mind of Mr. Linde's advice, however honestly given, was to add to the pressure of Bennett's threat. The lawyer representing both of them advising Mahon on March 11th, the day before the letting, to bow to Bennett's treachery and get whatever agreement he could, but get it in writing, foreclosed any freedom of choice if any was left.

THE DECISION OF THE APPELLATE COURT IS IN CONFLICT WITH THE ESTABLISHED MISSOURI CONTRACT LAW ON COERCION

The modern doctrine of duress by business compulsion is firmly rooted in Missouri law.[7] *Mississippi Valley Trust Co.* v. *Begley*, 298 Mo. 684, 694-696, 252 S. W. 76, 78, has this excellent review of Missouri law on the subject:

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[6] *Denny* v. *Guyton*, 327 Mo. 1030, 1092, 40 S. W. (2d) 562, 590; *Feinberg* v. *Milner*, 178 S. W. (2d) 108, 112 (St. Louis Ct. of App.); *Nelson* v. *Abraham*, 29 Calif. (2d) 745, 177 P. (2d) 931, 934; *Spencer* v. *Wilsey*, 300 Ill. App. 439, 71 N. E. (2d) 804, 808; *In re Gotfried*, 45 F. Supp. 939, 941 (S. D. Calif.); C. J. S., Vol. 48, pp. 824-826.

[7] The court's opinion here is in conflict with these Missouri cases: *White* v. *McCoy Land Co.*, 229 Mo. App. 1019, 1039-1040, 87 S. W. (2d) 672 (aff'd. *sub. nom. White* v. *Scarritt*, 341 Mo. 1004, 111 S. W. (2d) 18; *Brown* v. *Worthington*, 162 Mo. App. 508, 516-517, 142 S. W. 1082; *Mississippi Valley Trust Co.* v. *Begley*, 298 Mo. 684, 695-696, 252 S. W. 76, 78.

"I. As To Duress: It now seems well settled that it is sufficient to constitute duress, which will avoid a contract, that one party thereto is prevented from exercising his free will by reason of threats made by the other, and that the contract is obtained by reason of such fact. The test is the state of mind induced by the threats made. The character of the threats is not so material, it being sufficient to constitute legal duress, if they deprive the party purporting to be obligated by the contract of his free moral agency. * * * *Brown* v. *Worthington,* 162 Mo. App. 508 (threat not to deliver drove of hogs purchased, so as to prevent plaintiff from fulfilling contract of resale); *Niedermeyer* v. *Curators,* 61 Mo. App. 654 (threat to refuse admittance of plaintiff as student unless he paid illegal tuition fees); *Fout* v. *Giraldin,* 64 Mo. App. 165 (threat not to satisfy deed of trust unless plaintiff paid more than was due); *Link* v. *Real Estate Co.,* 182 Mo. App. 536 (threat to sell estate under deed of trust after notes had been paid); *Wells* v. *Adams,* 88 Mo. App. 215 (threat to refuse to release mortgage unless illegal demand was paid); *Brewing Co.* v. *St. Louis,* 187 Mo. 367, and *Westlake* v. *St. Louis,* 77 Mo. 47 (threat to turn off water and thereby injure business unless illegal demand was paid); *Simmons Hardware Co.* v. *City of St. Louis,* 192 S. W. 394, and *State ex rel.* v. *Reynolds,* 194 S. W. 878 (threat in each case to refuse license to do business and to prosecute unless illegal demand was paid); *Lappin* v. *Crawford,* 221 Mo. 380 (threat to prevent plaintiffs from obtaining loan already negotiated, unless they paid illegal demand as commission); * * *

"The above cases show that the law in this State is that threats of personal injury or criminal prosecution and imprisonment, as formerly held by the English and some American courts, are no longer required to make out legal duress, but that each case stands on its own heels, and if the obligation in question was incurred by reason of the threatened

> action or conduct of the party obtaining the contract, to expose the other party * * * to serious financial loss or injury of his business or property under distressing circumstances which an ordinary suit at law or equity might be inadequate to remedy, legal duress exists, provided the triers of the fact, whether court or jury, believe that by reason of such threatened action the will of the party entering into the obligation was overcome, and but for such threatened action or conduct he would not have entered into such obligation. And this is the modern rule generally in this country."

The state of Mahon's mind and will when he signed the written contract at 11:00 A. M. on March 12th was a question of fact to be determined by the jury and the trial judge. Applying Missouri law, Judge Johnsen, in *Furman* v. *Gulf Insurance Co.*, 152 F. (2d) 891, 894, said:

> "Whether the free will of a party has been so dominated in a particular transaction as to have controlled his action is ordinarily a question of fact, where it is possible under the evidence for there to have been a wrongful use of coercive means or circumstances. Cf. *White* v. *McCoy Land Co.*, 229 Mo. App. 1019, 1039, 1040, 87 S. W. (2d) 672, 685; *Winget* v. *Rockwood*, 8 Cir., 69 F. (2d) 326, 330."

So also, this court in the late *Yellow Cab* case refused to disturb fact findings of the trial court as to the state of mind and motives of witness-litigants who appeared before it, saying (338 U. S. 338, 341):

> "Findings as to the design, motive and intent with which men act depend peculiarly upon the credit given to witnesses by those who see and hear them. If defendants' witnesses spoke the truth, the findings are admittedly justified."

The opinion of the learned court below also apparently implies that Mahon waived the coercion and duress and ratified the written contract by remaining in Bennett's employ until August, 1945 (R. 766, 776).

Mahon had no other lawyers or advisers than the firm of Langworthy, Matz & Linde, and was never told what his rights were with respect to the joint adventure agreement until December, 1945, or January, 1946, when he consulted his present counsel (R. 204, 205). He stated, as the opinion recognizes (R. 776-777), that until that time he was under the impression he was bound by the written contract (R. 205). He sued April 4, 1946 (R. 8). The trial court made a special finding on this subject (Finding No. 7, R. 741).

There was no evidence in the record that the compulsion under which he signed the written contract was removed during the brief period ending in his being forced out by the Bennetts in August, 1945. And the opinion of the learned court below overlooked and is in conflict with a long line of cases in Missouri and elsewhere which hold that the same fear which prompted Mahon to sign the March 12th contract (the fear of losing everything) was presumed by the law to continue until some intervening fact or circumstance removed that fear or until the lapse of a long length of time from which that could be presumed. See the following cases: *Guardian Trust Co.* v. *Meyer,* 8 Cir., 19 F. (2d) 186, 193; *Bell* v. *Campbell,* 123 Mo. 1, 17, 25 S. W. 359, 363; *Eureka Bank* v. *Bay,* 90 Kan. 506, 135 Pac. 584; *Bray* v. *Haskins,* 229 S. W. 1074, 1078 (Mo. Sup.).

And it must appear that the claimed ratification occurred *after* the removal of the duress. *Bray* v. *Haskins, supra,* 229 S. W. 1074, 1078; 5 Williston, *Contracts* (Rev.

ed., 1937), Sec. 1626. We invite particular attention to Judge Van Valkenburgh's opinion in 19 F. (2d) 186, 193, *supra.*

Moreover, ratification by Rule 8 (c) should have been plead. Failing, this defense under Rule 12 (h) was waived. *Van Sant* v. *American Express Co.,* 3 Cir., 169 F. (2d) 355, 372. Bennett did attempt to plead ratification, but the facts pleaded were legally innocuous (R. 13).

II.

THE ISSUES OF JOINT ADVENTURE AND DURESS WERE BASICALLY LEGAL. THE VERDICT OF THE JURY, UNDENIABLY SUPPORTED BY SUBSTANTIAL EVIDENCE, WAS CONCLUSIVE AND THE COURT OF APPEALS ERRED IN HOLDING THAT ITS REVIEW WAS GOVERNED BY RULE 52 (a), AND REVERSING THE FACT FINDINGS BELOW DEPRIVED PETITIONER OF HIS CONSTITUTIONAL RIGHT UNDER THE SEVENTH AMENDMENT TO A TRIAL BY JURY OF THESE ISSUES.

The opinon characterizes the suit as a combined action in equity and at law (R. 763), assumes that the issues of joint adventure and coercion "were tried by the court in equity" (R. 766) and holds that review on these issues is governed "by the Rules applicable to appeals in equity" (R. 767).

Plaintiff prayed the court "to find, declare and hold" that he and defendant George Bennett had entered into a contract of joint adventure and that plaintiff had been forced to sign the March 12 contract by reason of the wrongful duress and coercive business compulsion of defendant George Bennett (R. 6-7). The court was also asked to find and declare the rights and legal relations between plaintiff and defendant George Bennett (R. 6).

That the primary prayers invoke jurisdiction under the Federal Declaratory Judgment Act is clear. The findings and declarations sought are authorized by Title 28, U. S. C. (1948), §§ 2201 and 2202. Section 2201 provides:

> "In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

The judgment and decree of the trial court found and declared the plaintiff's rights against George Bennett and their legal relations with each other (R. 742-743). No injunction actually issued. The judgment merely was that if Bennett excluded plaintiff from participating in the joint adventure, he would nevertheless be entitled to his share of the profits; and in the event of such exclusion, defendant Bennett "may, on application" be enjoined from such interference with plaintiff's rights (R. 742-743). The accounting issue was entirely separate, was not tried, the judgment and decree being appealed from as final without the accounting.

Rule 38 (b) provides that a party may demand a trial by jury "of any issue triable of right by a jury" by serving notice within 10 days after service of the last pleading. Defendants' answers were filed, respectively, on December 3 and December 9, 1946 (R. 9, 14). December 4, 1946, plaintiff filed his written demand for trial by jury "on all issues so triable" (R. 14).

Rule 57, the Declaratory Judgment Rule, preserves the right of trial by jury as provided in Rules 38 and 39.

Rule 38 (a) preserves inviolate the right of trial by jury as declared by the Seventh Amendment.

Since the adoption of the new Rules, the federal courts have steadily held that where the party's claims embrace issues which are both legal and equitable, that the right of trial by jury of the legal issues is not lost by the presence of equitable issues or claims for equitable relief. It has also uniformly been ruled that a declaratory judgment suit is neither legal nor equitable in its nature, and that where in such a suit equitable remedies are sought in addition to findings and declarations, a Constitutional right of trial by jury of the legal issues still exists. And the test is that if the declarations sought might otherwise be cognizable in an action at law, such issues are essentially legal and triable by a jury.

That plaintiff here had the right to sue at law for damages for breach of the joint adventure agreement is settled by the Missouri decisions, as well as the law elsewhere. *Denny* v. *Guyton*, 327 Mo. 1030, 1094, 40 S. W. (2d) 562, 591. That relief may be sought for duress by an action at law for damages was expressly held by the 8th Circuit in *Furman* v. *Gulf Ins. Co.*, 152 F. (2d) 891, 894, where Judge Johnsen, speaking for that court and quoting from the Restatement, said:

> "• • • As to personal property, relief ordinarily may be sought for duress by an action at law for damages. Restatement, Torts, §871, Comment c."

Plaintiff having a plain and adequate remedy at law on these issues, they were basically legal, were triable as of right by jury, and the verdict was conclusive on the appellate court. *Hargrove* v. *American Central Insurance Co.*, 10 Cir., 125 F. (2d) 225, 228; (*American*) *Lumbermen's Mut. Casualty Co.* v. *Timms and Howard*, 2 Cir.,

108 F. (2d) 497, 499-500; *Pacific Indemnity Co.* v. *McDonald*, 9 Cir., 107 F. (2d) 446, 448-449; *U. S. F. & G. Co.* v. *Koch*, 3 Cir., 102 F. (2d) 288, 291, 295; *Aetna Casualty & Surety Co.* v. *Quarles*, 4 Cir., 92 F. (2d) 321, 325; 3 Moore's, *Federal Practice* (1938 ed.), pp. 3005-3006; Borchard, *Declaratory Judgments* (2nd ed., 1941), pp. 674-676; *Ring* v. *Spina*, 2 Cir., 166 F. (2d) 546, 550.

See, also, *U. S.* v. *Knight*, 336 U. S. 505, 508.

It is true that the issues of joint adventure and coercion were by the trial court submitted to an "advisory" jury and that both the trial court and plaintiff assumed that the verdict was advisory only. But plaintiff clearly demanded a trial by jury on all issues so triable, and a mere misnomer of the jury as "advisory" amounted neither to waiver nor estoppel, and did not change the conclusive effect of the verdict when rendered.

Upon this ground alone, the opinion and judgment of the learned Court of Appeals should be quashed.

III.

THE COURT OF APPEALS EXCEEDED ITS JUDICIAL POWERS IN PRE-JUDGING PLAINTIFF'S CASE UNDER THE WRITTEN CONTRACT; AND IN SO DOING ABRIDGED HIS RIGHT TO DUE PROCESS AND TO A TRIAL BY JURY ACCORDED TO HIM BY THE FIFTH AND SEVENTH AMENDMENTS TO THE FEDERAL CONSTITUTION.

The Court of Appeals remanded the case for trial of the undetermined issue of plaintiff's wrongful discharge under the written contract. But its opinion holds in effect that plaintiff was rightfully discharged. Witness this language (R. 772-773):

> "• • • Mahon testified he was glad to get out of his former job of garbage inspector because he did not like the odor of garbage and his voluminous testimony makes it very clear that in the oral agreement

he said Bennett made with him, there was no understanding as to how close Mahon was to be to the garbage handling or handlers which was the subject matter of their negotiations. Nor did he say who was to decide on that important matter when the work should start. The testimony on the trial covered what occurred at the start of the work and it was shown beyond question that Mahon would not stay at the little office put up adjacent to the garbage scales and the garbage hog feeding lot for directing the work, though there was evidence tending to show that that was necessary. The evidence was convincing that he was not competent to start the work off properly; that uncollected garbage accumulated dangerously in the July heat, and that the whole enterprise was put in jeopardy until Bennett brought in competent and experienced persons who took over and redeemed the situation.[1]

* * * * * * *

[1]Bennett denies, however, that he discharged Mahon. He says that he liked Mahon and that he was always confident that he would find work within the terms of the employment contract for Mahon to do in spite of his manifest incompetency to manage the initial stages of the enterprise."

George Bennett's pleaded defense was that plaintiff "was unable to satisfactorily perform and discharge the services required of him" under the written contract (R. 11). That was his defense on the trial. On the first trial, the jury decided that plaintiff was wrongfully discharged (R. 87). Nevertheless, the Court of Appeals opinion sustains Bennett's defense by saying that the evidence was convincing that plaintiff was not competent and that the whole enterprise was put in jeopardy until Bennett brought in competent and experienced persons who took over and redeemed the situation. And in the footnote the learned court below refers to Mahon's "manifest incompetency to manage the initial stages of the enterprise" (R. 773). The mandate remanded the cause "for further

proceedings on the law action set forth in plaintiff's petition, consistent with the opinion of this court this day filed herein" (R. 780).

On a re-trial of this issue, may defendant Bennett offer this language in evidence? How can plaintiff hope to prove his competency when the Court of Appeals has said that he was incompetent to manage the garbage business?

That it was error for the court to pre-judge this issue has been recently held by this Court in *Fountain* v. *Filson*, 336 U. S. 681. That the Fifth Amendment guarantees to every man the right to be heard before his cause is condemned in court needs no exposition.

> "* * * An essential element of due process is an opportunity to be heard before the reaching of a judgment. By due process of law is meant 'a law, which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial.' *Trustees of Dartmouth College* v. *Woodward*, U. S. 1819, 4 Wheat. 518, 581, 4 L. Ed. 629 (Webster's argument). As said in *Galpin* v. *Page*, U. S. 1873, 18 Wall. 350, 368, 21 L. Ed. 959: 'It is a rule as old as the law, and never more to be respected than now, that no one shall be personally bound until he has had his day in court, by which is meant, until he has been duly cited to appear, *and has been afforded an opportunity to be heard.* Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and never can be upheld where justice is justly administered.' (Italics supplied) * * *" *L. B. Wilson, Inc.*, v. *Federal Communications Com'n.*, App., D. C., 170 F. (2d) 792, 802.

That this part of the opinion will undoubtedly cripple plaintiff in presenting his case to a new jury, and there-

fore also deprive him of his Constitutional rights under the Seventh Amendment, is equally plain.

For this reason alone, a writ of certiorari should issue.

URGENT NEED FOR CERTIORARI.

The action of the learned Court of Appeals in reversing the verdict, findings and judgment in the trial court raises questions of gravity and importance to the Federal Bench and to the bar all over the nation. The opinion renders innocuous and meaningless Rule 52 (a). It takes away from trial courts and confers upon appellate courts the time-honored prerogatives of the trial judge; and in doing so departs from the practice and disagrees with the opinions of, we believe, all the other federal circuits. In important respects it destroys the functioin of fact findings in court cases. It strikes down the Constitutional right of trial by jury in Federal Declaratory Judgment cases. And, finally, without trial, it pre-judges the merits of a party's claims in a case which it remands to the court below to be tried before a jury. Certiorari should issue here.

Respectfully submitted,

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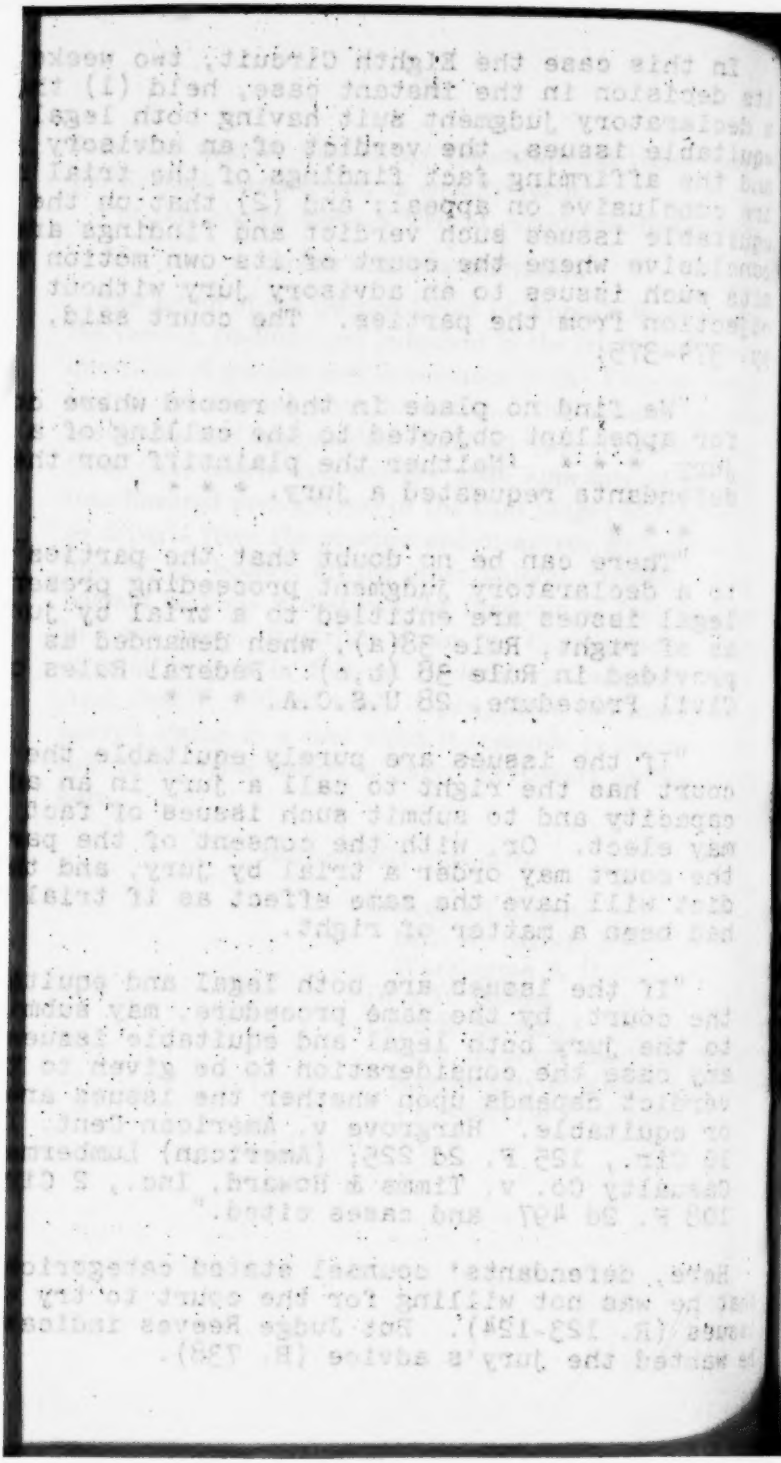
In this case the Eighth Circuit, two weeks after its decision in the instant case, held (1) that in a declaratory judgment suit having both legal and equitable issues, the verdict of an advisory jury and the affirming fact findings of the trial court are conclusive on appeal; and (2) that on the equitable issues such verdict and findings are conclusive where the court of its own motion submits such issues to an advisory jury without objection from the parties. The court said, pp. 374-375:

> "We find no place in the record where counsel for appellant objected to the calling of a jury. * * * 'Neither the plaintiff nor the defendants requested a jury. * * * '
>
> * * *
>
> "There can be no doubt that the parties to a declaratory judgment proceeding presenting legal issues are entitled to a trial by jury as of right, Rule 38(a), when demanded as provided in Rule 38 (b,c). Federal Rules of Civil Procedure, 28 U.S.C.A. * * *
>
> "If the issues are purely equitable the court has the right to call a jury in an advisory capacity and to submit such issues of fact as he may elect. Or, with the consent of the parties, the court may order a trial by jury, and the verdict will have the same effect as if trial by jury had been a matter of right.
>
> "If the issues are both legal and equitable, the court, by the same procedure, may submit to the jury both legal and equitable issues. In any case the consideration to be given to the verdict depends upon whether the issues are legal or equitable. Hargrove v. American Cent. Ins. Co., 10 Cir., 125 F. 2d 225; (American) Lumbermens Mut. Casualty Co. v. Timms & Howard, Inc., 2 Cir., 108 F. 2d 497, and cases cited."

Here, defendants' counsel stated categorically that he was not willing for the court to try these issues (R. 123-124). But Judge Reeves indicated he wanted the jury's advice (R. 738).



October Term, 1949

Office - Supreme Court, U. S.
FILED
JUN 2 1950
CHARLES ELMORE CROPLEY
CLERK

C. A. MAHON, Petitioner,

vs.

EORGE BENNETT, Doing Business as GEORGE BENNETT CONSTRUCTION COMPANY, and HARRY BENNETT, Respondents.

No. 784.

REPLY BRIEF OF PETITIONER.

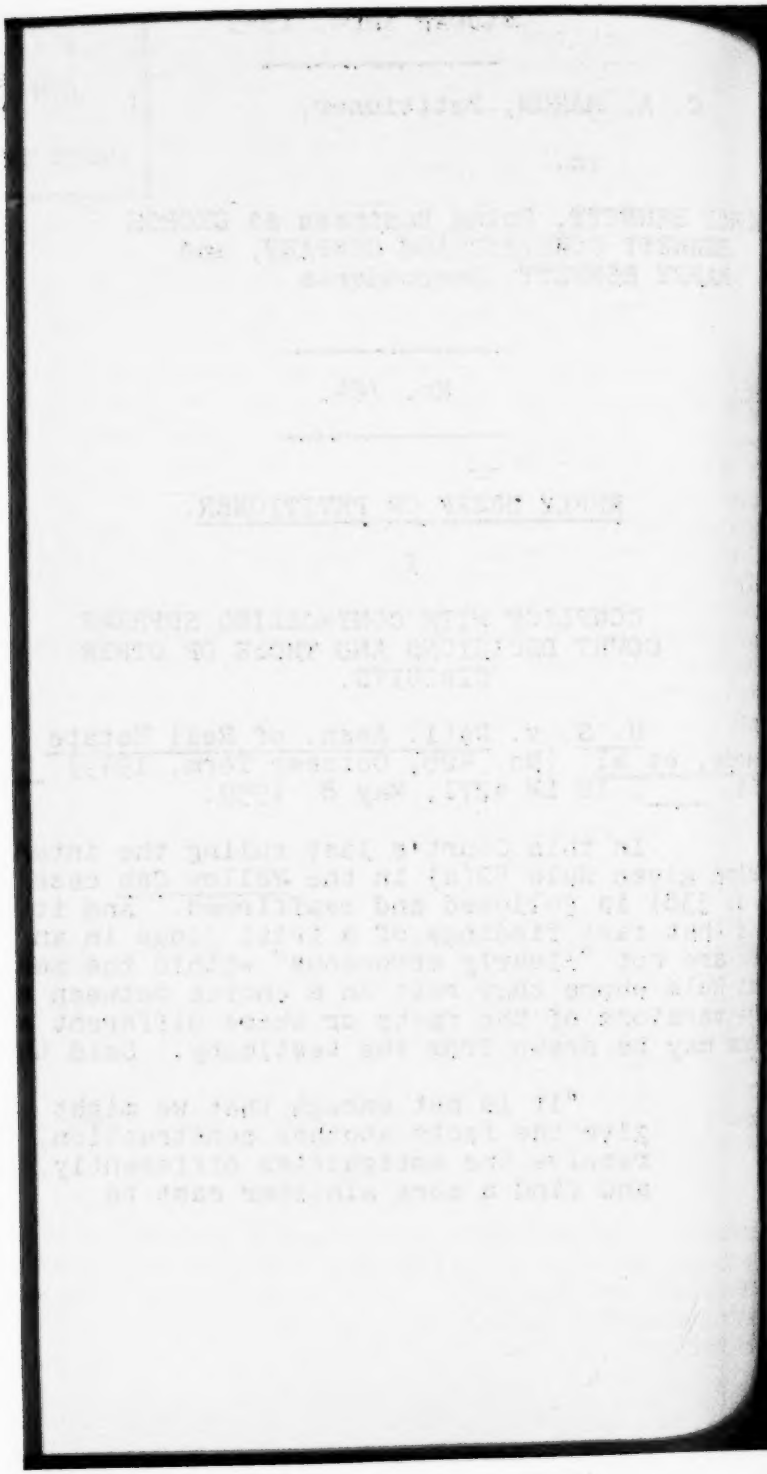
I.

CONFLICT WITH CONTROLLING SUPREME COURT DECISIONS AND THOSE OF OTHER CIRCUITS.

U. S. v. Natl. Assn. of Real Estate oards, et al. (No. 428, October Term, 1949) . S. ____, 18 LW 4271, May 8, 1950.

In this Court's last ruling the interpre- ation given Rule 52(a) in the Yellow Cab case (338 . S. 338) is followed and reaffirmed. And it is again eld that fact findings of a trial judge in an equity ase are not "clearly erroneous" within the meaning of hat Rule where they rest on a choice between two oppo- ite versions of the facts or where different conclu- ions may be drawn from the testimony. Said the Court:

> "It is not enough that we might give the facts another construction, resolve the ambiguities differently, and find a more sinister cast to



actions which the District Court apparently deemed innocent. See United States v. Yellow Cab Co., 338 U. S. 338, 342; United States v. Gypsum Co., 333 U. S. 364, 394-395. We are not given those choices, because our mandate is not to set aside findings of fact 'unless clearly erroneous.'"

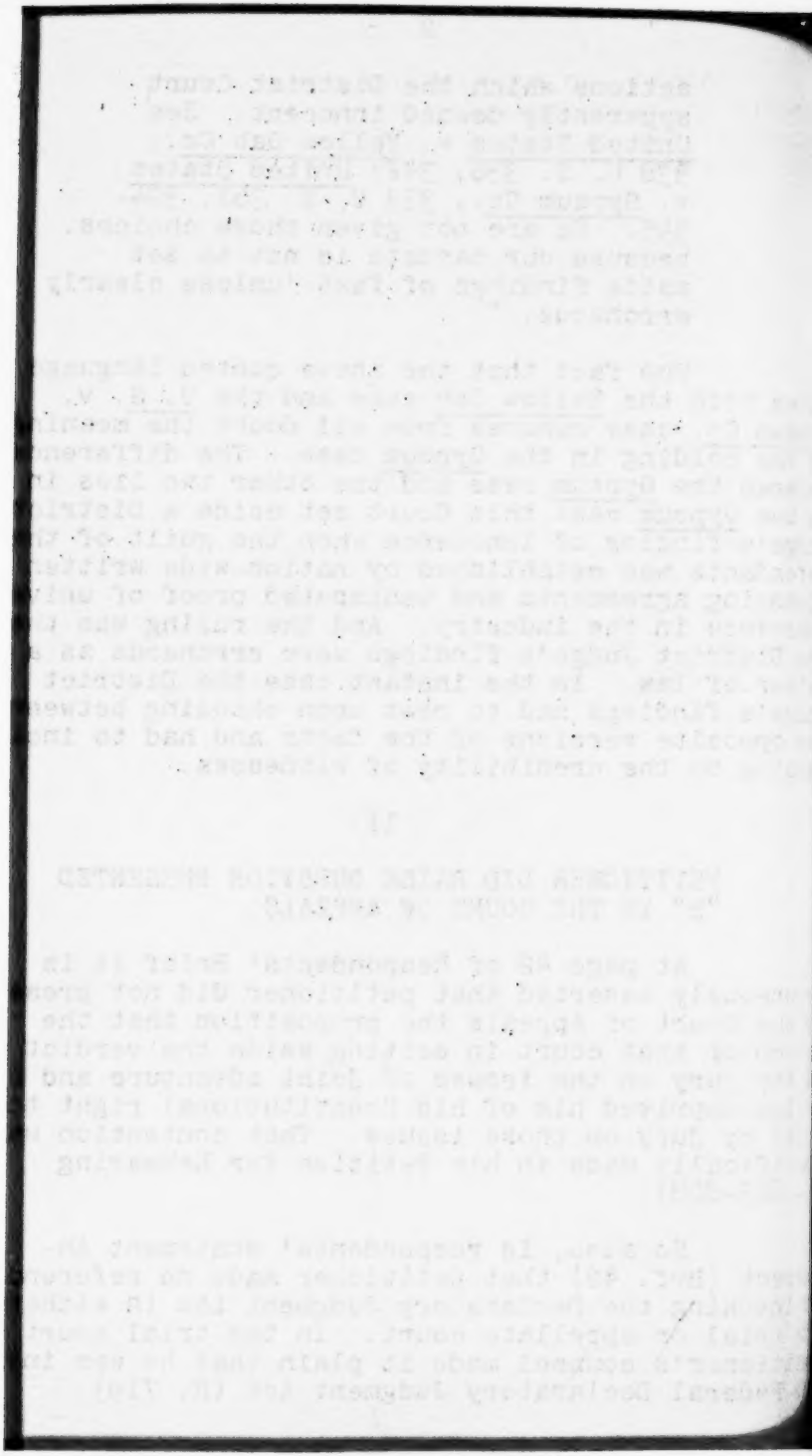
The fact that the above quoted language cites both the Yellow Cab case and the U. S. v. Gypsum Co. case removes from all doubt the meaning of the holding in the Gypsum case. The difference between the Gypsum case and the other two lies in this: In the Gypsum case this Court set aside a District Judge's finding of innocence when the guilt of the defendants was established by nation-wide written licensing agreements and undisputed proof of universal adherence in the industry. And the ruling was that the District Judge's findings were erroneous as a matter of law. In the instant case the District Judge's findings had to rest upon choosing between two opposite versions of the facts and had to include passing on the credibility of witnesses.

II.

PETITIONER DID RAISE QUESTION PRESENTED "B" IN THE COURT OF APPEALS.

At page 42 of Respondents' Brief it is erroneously asserted that petitioner did not present to the Court of Appeals the proposition that the action of that court in setting aside the verdict of the jury on the issues of joint adventure and coercion deprived him of his Constitutional right to a trial by jury on those issues. That contention was specifically made in his Petition for Rehearing (R. 803-808).

So also, is respondents' statement incorrect (Brf. 42) that petitioner made no reference to invoking the Declaratory Judgment Law in either the trial or appellate court. In the trial court petitioner's counsel made it plain that he was invoking the Federal Declaratory Judgment Act (R. 719).



Indeed, in appellants' brief in the Court Appeals opposing appellee's Motion to Dismiss, they treated this part of the suit as invoking the eral Declaratory Judgment Law. They said (p. 1):

" * * * It is the contention of the Appellants that the Judgment and Decree entered in this case is a final judgment from which an appeal may be taken not only under the provisions of the Federal Declaratory Judgment Act (28 U.S.C. Sec. 400; 28 U.S.C.A. Sec. 2201; Supp.), but also under the general provisions of the United States Code (28 U.S.C.A. Sec. 1291; Supp.). * * *

[p.10]

"Under the provisions of the Federal Declaratory Judgment Act, the Judgment and Decree appealed from in this case was and is a final and appealable judgment."

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